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IN THE

Supreme Court of the United States

October Term, 1959.

No. 888

UNITED STATES OF AMERICA ex rel. L. B. BINION,
Petitioner,

v.

WILLIAM A. O'BRIEN United States Marshal for the Eastern District of Pennsylvania.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1959.

No.

UNITED STATES OF AMERICA Ex REL.
L. B. BINION,

Petitioner,

v.

WILLIAM A. O'BRIEN, UNITED STATES MARSHAL FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

L. B. BINION, your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above-entitled case on December 9, 1959.

OPINIONS BELOW.

The opinion of the District Court (30a-35a) * is not reported. The opinion of the Court of Appeals (Appendix A, *infra*, pp. 17-22) is reported at 273 F. 2d 495.

JURISDICTION.

The judgment of the Court of Appeals (Appendix B, *infra*, p. 23) was entered on December 9, 1959. A timely petition for rehearing was denied on January 28, 1960 (Appendix C, *infra*, p. 24). The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTION PRESENTED

Where the evidence in a case is entirely documentary, and the case is tried to the court sitting without a jury, may a Court of Appeals, exercising a broader scope of review than the "clearly erroneous" test laid down by Rule 52(a), Federal Rules of Civil Procedure, reject the findings of fact made by the District Court and substitute new findings of its own?

STATUTES INVOLVED.

The statutes involved are set out in Appendix D, *infra*, p. 25.

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* References suffixed "a" are to the Appendix filed in the court below.

STATEMENT OF THE CASE.

On March 19, 1957, petitioner was released from prison on bail, by order of this Court,[1] pending adjudication of a collateral attack upon his conviction.[2] At that time he had served over three years and three months of a prison sentence and had only three months and twenty days to be served prior to the mandatory release date.[3] The problem posed by this case, a petition for writ of habeas corpus, is whether petitioner should receive credit toward that three months and twenty days for events which transpired subsequent to his being enlarged on bail by this Court.

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1. This order, dated March 11, 1957, is reported at 352 U. S. 1028. The proceeding in question, instituted by petitioner under 28 U. S. C. § 2255 in August 1956, challenged the validity of application of § 145(b) of the Internal Revenue Code of 1939 to income tax violations, for which petitioner had been convicted. This followed the decision of this Court in *Berra v. United States*, 351 U. S. 131, where the Government and the taxpayer agreed that § 3616(a) of the Internal Revenue Code was applicable to income tax returns. This issue was ultimately decided in *Achilli v. United States*, 353 U. S. 373.

The order granting bail followed by one week the order granting certiorari in the *Achilli* case. 352 U. S. 1023. Previous applications to the district court and court of appeals had been denied (3a).

Following the decision in *Achilli*, petitioner's case was decided adversely by the Fifth Circuit and, on October 14, 1957, this Court denied certiorari. 355 U. S. 834.

2. On December 14, 1953, petitioner pleaded guilty to two indictments found in the Western District of Texas, also alleging violations of 26 U. S. C. § 145(b), for the years 1947 and 1948. The sentence was a fine, which has been paid, and concurrent sentences of five years' imprisonment, to be followed by three years of probation. Petitioner was immediately committed (7a, 8a) and received at the United States Penitentiary at Leavenworth, Kansas, on December 19, 1953 (2a-3a, 25a, 26a).

3. Petitioner was imprisoned from December 14, 1953 until March 19, 1957. While in prison, he had earned 35 days additional good time. He thus had three months and 20 days to be served prior to the mandatory release date under 18 U. S. C. § 4163. Thereafter he served two days in prison in October 1957, pending institution of the present application for habeas corpus, thereby reducing his actually remaining time to three months and eighteen days.

Immediately upon his release from prison, petitioner contacted the Probation Officer charged with his supervision under a prior conviction. Under a sentence imposed by the Nevada District Court in 1952, petitioner was on probation until September 3, 1957.[4] The later sentence, imposed the following year in the Western District of Texas, involved the prison term here in issue.[5]

When petitioner reported to the Probation Officer in Nevada, that officer directed him to resume compliance with the probation order.[6] The terms of that order required petitioner to report to the Probation Officer once every 60 days.[7] Petitioner complied with that order, as directed, for the remaining five and one-half months of the sentence until, in September 1957, that judgment expired.[8] Until the Court of Appeals suddenly and inexplicably made it a controlling issue, the routine fulfillment of this sentence played no part in this case.

The central issue presented to the District Court in the petition for habeas corpus concerned the action of the Probation Officer in connection with the prison sentence from which petitioner had been freed on bail by this Court. The Probation Officer ordered petitioner to submit to additional restraints on the basis of this sentence. Release on *bail* after serving three and one quarter years in prison is a most unusual event, and the Probation Officer declared that

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4. On September 3, 1952, petitioner pleaded *nolo contendere* to an indictment found in the District of Nevada charging him with violating 26 U. S. C. § 145(b) for the year 1949. The sentence was a fine, which has been paid, and probation for a period of five years, the condition of which was that petitioner should report once every 60 days to the federal probation officer.

5. See note 2 *supra*.

6. Petitioner had complied with the conditions of that order for more than one year before surrendering to custody under the second sentence. While in prison, he was of course not required to report to the Probation Officer.

7. 27a.

8. The District Court order was signed on September 13, 1957 (14a).

he was unclear as to petitioner's status under this release. In the Probation Officer's own words, "no information was available relative to his status" (23a). Accordingly, the Probation Officer decided to treat him as if he had been placed on parole or given conditional release from prison. He ordered petitioner to comply with the identical restraints imposed upon such persons.

Thus, in addition to the requirements of the probation order, petitioner was ordered to report to the Probation Officer by personal contact not less than once a week. From his release date in March, 1957, through October 23, 1957; a period in excess of seven months, petitioner "reported faithfully and conscientiously" as instructed by the Probation Officer. The expiration on September 3 of the probation sentence, requiring contact only once every two months, naturally had no effect upon the much more onerous restraint imposed upon the petitioner in connection with the prison sentence.

It is significant and illuminating to note how the unlawful restraint was finally terminated. On September 19, 1957, the Nevada Probation Officer wrote to the Parole Executive in Washington, D. C., to ask for instructions on how to proceed with petitioner's case. Weeks went by without an answer to this inquiry. Meanwhile, on October 14, 1957, the collateral attack litigation, which underlay petitioner's release by this Court on bail, terminated unfavorably to petitioner's contentions.[9] Petitioner accordingly surrendered to the United States Marshal in Philadelphia.

Thereupon petitioner instituted this habeas corpus action.[10] Finally, *at this stage*, the Parole Executive responded to the inquiry from the Nevada Probation Officer.[11] The Parole Executive wrote on October 21 that peti-

9. See note 1 *supra*.

10. Petitioner was released on bail by the District Court pending disposition of the application for writ of habeas corpus.

11. The Parole Board may have been irked by the actions of petitioner—or his counsel—in obtaining his release from the penitentiary. We point this out, not because the problem of an utter abuse

tioner had filed a petition for habeas corpus and that "there will be no requirements as far as the Board of Parole is concerned for any reporting" (R. 18a-19a).

The District Court (Welsh, J.), on stipulation of counsel for the government and the petitioner and documentary evidence, in lieu of testimony, granted petitioner the writ of habeas corpus. He held that petitioner earned confinement time toward his prison sentence as a result of the close supervision erroneously imposed by the Probation Officer. Since this extended over a period of seven months, in excess of the time remaining to be served when petitioner was released on bail, the Court ruled that petitioner was entitled to his liberty.

The Court of Appeals reversed. The Court of Appeals agreed that petitioner was entitled to credit toward his prison sentence for the unlawful restraints imposed upon him—but only for the time after the probation sentence expired. Because the case had been heard on briefs and documents in the District Court, the Court of Appeals held that it was not circumscribed by the facts found by the lower court. The Court of Appeals found, as a fact, that all of the restraint imposed on petitioner prior to September 3, 1957, related to the probation sentence. Therefore, in the court's view, petitioner was seeking "double credit—for completion of his probation and completion of his sentence of imprisonment for the same reporting to or contact with his probation officer" (Appendix A, p. 20). The Court of Appeals did give petitioner credit for one month and 20 days for the period of restraint from September 3 to October 23, 1957.

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of discretion of the Parole Board is now before this Court, but solely to meet the argument advanced in the court below that petitioner "took advantage of every opportunity provided by the law to delay service of his sentence, and then, when service finally became inevitable, he immediately sought to convert the very delay provided by his period of freedom on bail into a constructive service of sentence." (United States Brief, p. 21). The Government is here speaking of the bail which this Court granted to petitioner over the strenuous objections of the Government.

By a timely petition for rehearing, in addition to other reasons, petitioner contended that the order of the District Court should be upheld, even on the Court of Appeals' view of the case, because petitioner's sentence had expired during the time between the order of the District Court granting the writ of habeas corpus and the noting of an appeal by the United States. The District Court order was dated December 23, 1958. The United States filed notice of appeal 58 days later, according to the Court of Appeals the exact time remaining to be served by petitioner. The petition for rehearing was denied.

REASONS FOR GRANTING THE WRIT.

The consequence of the Court of Appeals' decision is to leave petitioner with 58 days to serve in prison. Petitioner cannot represent to this Court that 58 days of his life, however valuable to him, are of sufficient general importance to call for an exercise of this Court's certiorari jurisdiction. This is not to minimize in any way the personal hardship entailed in being returned to prison for two months after more than three years of liberty, during which time petitioner has been thoroughly rehabilitated into a useful and normal life.[12] It is simply to say that the peculiar circumstances of

12. *Cf.* the following very pertinent discussion of the parole laws in *United States v. O'Donovan*, 107 F. Supp. 347, 350 (E.D. Ill. 1952):

> "The parole laws are for the protection of society as well as rehabilitation of the parolee. If a prisoner be required to serve his maximum sentence he is ultimately turned back into society without supervision, and in many instances without adequate rehabilitation. When a parolee, as here, is normally adjusting and abiding by the terms of his parole, no parole violator's warrant should issue under the present statute without substantial evidence of a parole violation. To do so permits interruption of the rehabilitation by separation from family and job, thereby delaying and demoralizing the parolee. This is a loss to society and the unwarranted interruption imperils, and in many cases, would destroy the rehabilitation and the parole structure."

this most regrettable case do not, in themselves alone, seem to justify invoking the jurisdiction of this Court.

Fortunately, from petitioner's standpoint, there is also a vital question of considerable importance presented by this case. Moreover, it is a question upon which the Courts of Appeals of the several circuits are sorely in conflict. Not only are there conflicting decisions between the circuits, but there are instances of conflict within a given circuit.

The issue concerns the application of Rule 52(a) of the Federal Rules of Civil Procedure on the scope of review by the Courts of Appeals of findings of fact in nonjury cases by District Courts on the basis of documentary evidence. Rule 52(a) of the Federal Rules of Civil Procedure provides:

> "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses."

The basic problem, on which the courts and the commentators are in irreconcilable conflict, is whether the "clearly erroneous" standard applies to documentary or non-demeanor evidence. The First Circuit has said: "There is a singular lack of unanimity on this point, not only between, but within, individual circuits." *Texas Co. v. R. O'Brien & Co.*, 242 F. 2d 526, 529 n. 1 (C. A. 1, 1957), and see the listing of conflicting decisions therein.

On the one hand, there are a substantial number of courts which have held that the "clearly eroneous" standard applies to all nonjury cases, regardless of the nature of the evidence. *E.g., Commercial Standard Insurance Co. v. Maryland Casualty Co.*, 248 F. 2d 412 (C. A. 8, 1957) ("Appellant contends that this court is not bound in this case by

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The court is of the opinion such was not the congressional intent. Where the parole has been rightfully earned and the process of rehabilitation entered into with satisfactory progress, the court is of the opinion the congressional intent is such progress shall not be lightly interrupted and only disturbed upon substantial evidence of a parole violation."

the provisions of Rule 52(a) of the Federal Rules of Civil Procedure, 28 U. S. C. A., because the trial was had on stipulated facts and uncontroverted testimony of the witnesses. . . . However, this court has consistently held that Rule 52(a) is applicable in nonjury cases." *Id.* at 416); *Azevedo v. Commissioner*, 246 F. 2d 196 (C. A. 9, 1957) ("The circumstance that the parties stipulated to the basic facts does not alter our function in reviewing the sufficiency of the evidence to support the findings. The rule is nevertheless applicable that the findings of fact of the trial court are not to be set aside unless clearly erroneous." *Id.* at 197); *Randall Foundation, Inc. v. Riddell*, 244 F. 2d 803 (C. A. 9, 1957) ("Appellant urges that, since there is a written stipulation as to certain facts, this Court must disregard the findings of the trial court and decide the case on our interpretation of the documents. Some courts have presumed to state such a rule where the evidentiary facts are entirely based upon stipulation or documents. . . . The Rules say that the findings of fact of the trial judge shall not be set aside unless clearly erroneous, and no exception is made as to facts found based upon writings." *Id.* at 805); *Texas Co. v. R. O'Brien & Co.*, 242 F. 2d 526 (C. A. 1, 1957) ("Some courts have held Rule 52(a) not to apply where the findings below were based upon stipulated or undisputed subsidiary facts. We have not. . . . In our opinion Rule 52(a) unambiguously governs all findings, and its additional caveat, that due regard is to be given to the trial court's opportunity to judge credibility, is merely cautionary advice, not a variation in the scope of review." *Id.* at 529.[13]

13. This view is strongly supported by Judge Charles E. Clark, draftsman of the Federal Rules of Civil Procedure. See Clark, Special Problems in Drafting and Interpreting Procedural Codes and Rules, 3 Vand. L. Rev. 493 (1950); Clark, Reviews of Facts Under the Proposed Federal Rules, 20 J. Am. Jud. Soc'y 129 (1936). It is amply supported in the history of Rule 52(a). See Wright, The Doubtful Omniscience of Appellate Courts, 41 Minn. L. Rev. 751, 768-770 (1957).

In *Bishop v. United States*, 223 F. 2d 582 (C. A. D. C., 1955), the Court of Appeals for the District of Columbia held that the "clearly erroneous" test applied to a case involving an application for postconviction relief under 28 U. S. C. § 2255. "We are not to reverse a finding by a trial court, even if upon documentary evidence, unless we conclude that the finding is clearly erroneous on the entire evidence." *Id.* at 587.[14]

Arrayed against these cases are the decisions of other circuits, probably representing a majority of the courts.[15] The most famous opinion on this side of the issue is by Judge Jerome Frank in *Orvis v. Higgins*, 180 F. 2d 537 (C. A. 2), *cert. denied*, 340 U. S. 810 (1950). Professor Moore wrote of this opinion:

> "Aside from the intrinsic persuasiveness of Judge Frank's opinion its theory is a natural and proper concomitant of appellate power. It probably will and should commend itself to other circuits." 5 Moore's Federal Practice 2642 (1951).

In 1957, Professor Charles Alan Wright, although in avowed disagreement with the position, stated that "it is probably true that Judge Frank's view is the more popular among the federal courts of appeals." Wright, The Doubtful Omniscience of Appellate Courts, 41 Minn. L. Rev. 751 (1957).

Included among the circuits favoring a very broad scope of judicial review where findings are based upon docu-

14. The judgment in this case was vacated and the case remanded for a hearing by this Court. 350 U. S. 961. This action implied disapproval of the attempt by the lower courts to decide the issues presented on the record of earlier proceedings or on documents of doubtful legitimacy as part of the record. It does not appear to express disapproval of the Court of Appeals' stand on scope of review.

15. See cases cited from seven circuits in Wright, Amendments to the Federal Rules: The Function of a Continuing Rules Committee, 7 Vand. L. Rev. 521, 534 n. 33 (1954); 5 Moore's Federal Practice 2637 n. 2 (1959 Supp.).

ments is the Third Circuit. This position was recently emphasized in *United States v. United Steelworkers of America*, 271 F. 2d 676, 685 (C. A. 3, 1959). That position was reiterated when the court decided the instant case. "The rule which calls upon an appellate court to support findings of fact of a district judge unless clearly erroneous . . . is inapplicable insofar as it is bottomed upon the trial court's opportunity to observe the demeanor of the witnesses, for the case was submitted on briefs and documents" (Appendix A, p. 20).

This Court has not yet taken a firm position on this conflict among the circuits. In the *United Steelworkers* case, *supra*, the majority avoided the issue of scope of review on findings relating to the statutory term "national health" and held that the judgment below was "amply supported" on the matter of peril to the "national safety." 361 U. S. at 42. Mention was made of the "concurrent findings of the two lower courts." *Id.* at 41. Mr. Justice Frankfurter joined in a concurring opinion by Mr. Justice Harlan, impliedly accepted the "clearly erroneous" test when he wrote: "Findings based directly upon them [affidavits of executive officers] cannot be said to be 'clearly erroneous.'" *Id.* at 44, 47-48. A frequently cited earlier opinion of this Court, *United States v. United States Gypsum Co.*, 333 U. S. 364 (1948), likewise does not provide an effective rationale for resolution of the conflict among the circuits.

The dimensions of the fact issue in the instant case are essentially uncomplicated. The District Court found that petitioner had been subjected to unlawful restraint which constituted an ameliorated imprisonment and entitled petitioner to credit toward his prison sentence. Although the District Court did not make it explicit, the only reasonable reading of its opinion shows that the court was dealing only with the prison sentence in making this finding. The probation sentence had been noted in the court's statement of the facts, but it had no bearing on the disposition of the issue before the court because it had never been suggested

that the unlawful restraint had any connection whatsoever with the probation sentence.[16]

One sentence in the District Court's opinion was seized upon by the Court of Appeals and led to the reversal. The District Court had said:

> "The heart of the matter is that, when relator was released on bond by order of the Supreme Court, he was under no restraint other than the usual limitation of action imposed on one released on bail." (33a)

That proposition is entirely correct and undisputable if viewed solely in the context of discussion of the prison sentence, which patently was the only question the District Court was then discussing. But the Court of Appeals took a different look.

> "We cannot agree with the district court. . . . On the contrary, Binion at that time, March 19, 1957, and until September 3, 1957, was a probationer under the Nevada sentence which clearly required reporting to his probation officer. To ignore the explicit terms of the Nevada sentence would be clearly unwarranted." (Appendix A, p. 20) [17]

Having thus dragged the probation sentence into its analysis, the Court of Appeals exercised its asserted privilege to make findings of fact on the documentary evidence without regard to the findings of the court below. This process actually comes in two steps:

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16. In the District Court the Government never argued that petitioner's unlawful restraint was wholly or in part attributable to the probation sentence. Neither did it do so in the Court of Appeals. The principal Government contention has been throughout that petitioner was "at liberty on his own initiative" and was not therefore entitled to any credit for events which transpired.

17. This brings to mind a significant statement of this Court many years ago: "We are not at liberty to refer to the opinion [of a lower court] for the purpose of eking out, controlling or modifying the scope of the findings." *Stone v. United States,* 164 U. S. 380, 383.

Step one: The Court of Appeals found as a fact that the unlawful restraint which occurred prior to September 3 derived from both sentences, the prison sentence and the probation sentence. The court said that the "same reporting" related to both sentences and "in essence, Binion desires double credit" (Appendix A, p. 20). This is a clear finding of fact. Whereas the District Court had found that the Probation Officer imposed the unlawful restraint solely in connection with the prison sentence, the Court of Appeals found that the Probation Officer imposed the unlawful restraint on the basis of both the probation sentence and the prison sentence.

Step two: The Court of Appeals then found that the unlawful restraint which occurred prior to September 3 must be allocated *entirely* to the probation sentence. The nature of this finding is somewhat obscure in the opinion of the Court. Conceivably it is in the nature of a conclusion of law—that a person can serve only one sentence at a time. This may be the import of the sentence: "Since he had a duty to report under the Nevada probation order until September 3, 1957, he cannot be given credit on his *later* sentence for reporting done prior to that date" (Appendix A, p. 20). (Italics added.) It is significant that the court here speaks of the "duty to report" under the probation sentence, not the actual unlawful restraint imposed in fact.

It is beyond belief, however, that the Court of Appeals would have held that concurrent sentences are illegal. That is the necessary effect of saying that service of the prison sentence must await completion of the probation sentence. Furthermore, to premise that the actual unlawful restraint arose, even in part, from the prison sentence, but that the petitioner is not to receive credit therefor, would be a plain violation of the Fifth Amendment. "[T]he Constitution was designed as much to prevent the criminal from being twice punished for the same offense as from being twice

tried for it." *Ex parte Lange*, 18 Wall. (85 U. S. 163, 173. See also *Roberts v. United States*, 320 U. S. 264, 273, 276.[18]

It is so improbable that the Court of Appeals would have made so flagrant a departure from fundamental principles of constitutional and criminal law that the most likely construction of its decision seems to be that the court found, as a fact, that all of the restraint prior to September 3, 1957, arose from the probation sentence. These matters were brought to the attention of the Court of Appeals by a petition for rehearing, but the petition was denied without opinion to elucidate on the exact nature of the second step in the court's reasoning.

Plainly enough, the Court of Appeals made at least one step, and possibly two, into the process of fact finding under the view that the appellate court is as well situated as the trial court to evaluate documentary evidence. Petitioner will argue, in the event that certiorari is granted, that appellate courts should confine their review of fact issues to the scope defined by the "clearly erroneous" test. This case in itself demonstrates the truth in the wry understatement of Judge Chase:

> "Though trial judges may at times be mistaken as to facts, appellate judges are not always omniscient." *Orvis v. Higgins*, 180 F. 2d at 542.

The District Court found, correctly we submit, that the unlawful restraint imposed by the Nevada Probation Officer concerned only the prison sentence. There was no doubt as to the terms of the probation order, which had been routinely complied with prior to petitioner's commenc-

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18. Courts of Appeals have consistently held that it is improper to increase a defendant's sentence after he has undertaken its service. *United States v. Rosenstreich*, 204 F. 2d 321 (C. A. 2, 1953); *Wilson v. Bell*, 137 F. 2d 716 (C. A. 6, 1943); *Frankel v. United States*, 131 F. 2d 757 (C. A. 6, 1942). More specifically, it is clear that concurrent sentences cannot be converted into consecutive sentences. *United States v. Chiarella*, 214 F. 2d 838 (C. A. 2, 1954); *Rutledge v. United States*, 146 F. 2d 199 (C. A. 5, 1944).

ing service of the prison sentence. The Probation Officer was in doubt as to petitioner's status under his release by this Court in the midst of serving his prison sentence. It is not difficult to see how the Probation Officer could analogize petitioner's status to one on parole or conditional release from prison. In his own words, the Probation Officer avers:

> "Secondly, in addition to the requirements of probation, I required L. B. Binion to report by personal contact not less than once a week from his release date of March 19, 1957 until October 23, 1957. Thereafter, Binion reported to me in the same manner as I would require a parolee or CR [conditional releasee] to report for supervision." (23a)

His actual treatment of petitioner did not vary in the slightest when the probation sentence ended.

The issue is sharply posed for resolution of the irreconcilable conflict among the circuits on the scope of the power of appellate judges to make substitute findings of fact where such findings rest upon documentary evidence. The issue is mature and ripe for decision. Not only the courts but legal commentators have plumbed the problem and brought forth the relevant competing considerations. The conflict will only be resolved when this Court undertakes to give a definitive interpretation of Rule 52(a).

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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April 1960.

APPENDIX A.

Opinion Below.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,891

UNITED STATES OF AMERICA, EX REL. L. B. BINION

v.

WILLIAM A. O'BRIEN, UNITED STATES MARSHAL FOR THE EASTERN DISTRICT OF PENNSYLVANIA,
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued October 6, 1959

Before BIGGS, *Chief Judge*, and MCLAUGHLIN and STALEY, *Circuit Judges*.

OPINION OF THE COURT

(Filed December 9, 1959)

By STALEY, *Circuit Judge*.

This is an appeal by the government from the grant by the district court of a writ of habeas corpus. It presents the unique problem of a relator who asserts that he is entitled to credit on his sentence for the period he was subjected to supervision by a federal probation officer while on bail from that sentence.

The relator, Binion, was indicted for evasion of his income tax for the year 1949 in violation of Section 145(b) of Title 26, U.S. Code, 26 U.S.C.A. (1939) § 145(b). He entered a plea of nolo contendere in the United States Dis-

trict Court for the District of Nevada on September 3, 1952, and was sentenced to pay a fine, which was duly paid, and placed on probation for a period of five years from September 3, 1952, to September 3, 1957. The probation was conditional upon Binion's reporting every sixty days to the federal probation officer, and there was no violation of any of the conditions of the probation.

Thereafter, on December 14, 1953, Binion pleaded guilty to two indictments charging income tax evasion for the years 1947 and 1948. He was fined $20,000 and sentenced to three imprisonment terms of five years each, to run concurrently, and to be followed by probation for three years. Service of the sentences commenced the same day, when he was committed to the custody of the Marshal for the Western District of Texas.

After serving more than two and one-half years in the United States Penitentiary at Leavenworth, Kansas, Binion filed a motion for correction of his sentence pursuant to 28 U.S.C. § 2255. This motion was denied, and an appeal was taken to the United States Court of Appeals for the Fifth Circuit. Action on the appeal was deferred on September 22, 1956, pending the decision of the Supreme Court in Achilli v. United States, 353 U.S. 373 (1957). One month later Binion made application to the district court for release on bail, and his request was denied. Subsequently, on February 14, 1957, the court of appeals also denied his request. Four days later he made application to the Supreme Court, and on March 11, 1957, the Supreme Court admitted him to bail, pending disposition of the Achilli case, upon a bond in the sum of $25,000. The bond having been posted, the United States District Court for the Western District of Texas on March 18, 1957, ordered Binion released, and he was released the following day. At the time of his release he had three months and twenty days remaining to serve on the Texas sentence in order to be eligible for mandatory release.

On March 21, 1957, Binion reported to the Chief United States Probation Officer in Las Vegas, Nevada, and continued to report to him until ordered back to the penitentiary. The Nevada probation order had required him to report to the probation officer every sixty days from September 3, 1952, until September 3, 1957. While free on bail, in addition to the conditions of probation imposed by the Nevada sentence, Binion was required by the probation officer to report by personal contact not less than once a week, and he did so.

The Supreme Court handed down its decision in Achilli v. United States, 353 U.S. 373, on May 27, 1957. In accordance therewith the court of appeals affirmed the district court's denial of the motion to correct Binion's sentence, 245 F.2d 466 (C.A.5, 1957). Binion then filed a petition for writ of certiorari which was denied on October 14, 1957, 355 U.S. 834. Two days later he surrendered to the United States Marshal at Philadelphia. However, on the same day, he filed a petition for writ of habeas corpus and was released on October 17 on $5,000 bail pending decision thereon.

The district court found that the Nevada probation officer required relator to report in the same manner as a parolee from March 19 to October 23, 1957, a period far greater than the three months and eighteen days remaining to be served on his sentence of imprisonment.[1] Recognizing that parole is an ameliorated imprisonment, the court was of the opinion that Binion earned confinement time unless there were other factors in the case that would alter the effect of the reporting. The most important "other factor" considered by the district court was Binion's status while out on bail. On this point the district court concluded that "when relator was released on bond by order of the Supreme Court he was under no restraint other than the usual limitation of action imposed on one released on bail." Ac-

1. It is agreed that Binion should be credited with the two days he spent in jail in Philadelphia after surrendering to the Marshal, October 16 and 17, 1957. This reduces the remaining time from three months and twenty days to three months and eighteen days.

cordingly, the petition for writ of habeas corpus was granted.

The rule which calls upon an appellate court to support findings of fact of a district judge unless clearly erroneous, Fed. R. Civ. Proc. Rule 52(a), is inapplicable insofar as it is bottomed upon the trial court's opportunity to observe the demeanor of the witnesses, for the case was submitted on brief and documents. See United States v. United Steelworkers of America, F.2d (C.A.3, decided Oct. 27, 1959). In addition, our review of the ultimate facts is not in any way circumscribed by the clearly erroneous rule.

Initially, we must consider Binion's status when placed on bail by the Supreme Court. We cannot agree with the district court that Binion, when enlarged on bond, was under no restraint other than the usual limitations of one so freed. On the contrary, Binion at the time, March 19, 1957, and until September 3, 1957, was a probationer under the Nevada sentence which clearly required reporting to his probation officer. To ignore the explicit terms of the Nevada sentence would be clearly unwarranted. It is true that, while incarcerated, he was not required to affirmatively report, for in fact he could not do so. However, upon release, the terms of his probation became operative, and he had a duty to report, for the Supreme Court's action on his request for bail did not purport to affect his status as a probationer under the Nevada sentence, but rather only went to his status under the Texas sentence. In essence, Binion desires double credit—for completion of his probation and completion of his sentence of imprisonment for the same reporting to or contact with his probation officer. Since he had a duty to report under the Nevada probation order until September 3, 1957, he cannot be given credit on his later sentence for reporting done prior to that date. The frequency of the reporting during this period does not create a different status as does a requirement to report when there is no duty to report at all.

This brings us to the period of reporting required by the probation officer following termination of the probation,

that is, September 3, 1957, through October 23, 1957. The probation officer requested instructions from the Parole Board Executive in Washington with regard to Binion's status and while awaiting instructions required Binion to continue reporting.[2] As to this period of one month and twenty days, the conclusion of the district court which we have considered above is most apt. Binion had no duty to report and was under no restraint other than that imposed on one released on bail. Regardless, he was required by the probation officer to continue to report weekly.

The district court found that Binion reported in the same manner as a parolee or a person who was conditionally released for supervision. This finding is based in part upon the statement of the probation officer that "Binion reported to me in the same manner as I would require a parolee or C.R. [conditional releasee] to report for supervision." The court, recognizing that Binion was not on parole de jure, nevertheless concluded on the facts that he was on parole de facto.

The government does not question that parole is in legal effect imprisonment, albeit an ameliorated form thereof, Anderson v. Corall, 263 U.S. 193 (1923); Jenkins v. Madigan, 211 F.2d 904 (C.A.7), cert. denied, 348 U.S. 842 (1954); but contends that the status of parole can only be created through the procedures laid down in statutes and regulations. Certainly, this is the case as regards parole de jure. This argument, however, begs the question, for the real issue is whether Binion should be credited with the period during which he was restrained by an officer clothed with the apparent authority to do so.

The government attempts to distinguish the actions of the probation officer here from those of the marshals or wardens in the following cases where credit was given for

2. The Parole Board failed to reply to this letter of September 19, 1957, until October 21, 1957 (received by the probation officer on October 23, 1957). The letter indicated that Binion was not reporting pursuant to any order or request by the Board and that he was not in the custody of the Attorney General while free on bail.

improper action taken by them. Smith v. Swope, 91 F.2d 260 (C.A.9, 1937); Albori v. United States, 67 F.2d 4 (CA.9, 1933); White v. Pearlman, 42 F.2d 788 (C.A.10, 1930); Price v. McGuinness, 269 Fed. 977 (C.A.3, 1920); United States v. Jones, 147 F. Supp. 268 (D.C.Md. 1957); in re Jennings, 118 Fed. 479 (E.D.Mo. 1902). No logical distinction can be drawn between these cases and that at bar. They stand for the proposition that where an individual's liberty is restrained by the act of an officer of the United States having authority to exercise restraint, such individual is entitled to credit for the period of that restraint towards service of his sentence. The probation officer here had actual authority by virtue of the Nevada sentence to require Binion to report during the period of that sentence, i.e., until September 3, 1957. Thereafter, since Binion no longer had the status of a probationer, the officer was devoid of authority to require further reporting. Nevertheless he required relator to do so until October 23, 1957. Based upon the cases cited supra, it appears to us that Binion is entitled to credit on his Texas sentence of imprisonment for that period during which he was required to report following expiration of his Nevada sentence of probation, since his status then was solely that of one released on bail.

The cases cited by the government in regard to estoppel completely fail to support its position, for they involve contract considerations and, of course, are not applicable here where an individual's liberty is at issue. Likewise, Binion's contention that he has a right not to serve his sentence in instalments is hardly persuasive, for it was his action, vigorously contested by the government, that resulted in his release on bail. We have considered the other points raised by the parties but find them to be insubstantial.

In accordance with the foregoing opinion, the judgment of the district court will be reversed.

APPENDIX B.

Judgment Below.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,891

UNITED STATES OF AMERICA, EX REL. L. B. BINION

v.

WILLIAM A. O'BRIEN, UNITED STATES MARSHAL FOR THE EASTERN DISTRICT OF PENNSYLVANIA,
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Present: BIGGS, *Chief Judge*, and MCLAUGHLIN and STALEY, *Circuit Judges*.

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby reversed.

Attest:
IDA O. CRESKOFF,
Clerk.

Dated:

December 9, 1959.

APPENDIX C.

Judgment Denying Rehearing.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,891

UNITED STATES OF AMERICA, EX REL., L. B. BINION

v.

WILLIAM A. O'BRIEN, UNITED STATES MARSHAL FOR THE EASTERN DISTRICT OF PENNSYLVANIA,

Appellant.

SUR PETITION FOR REHEARING

Present: BIGGS, *Chief Judge*, and MCLAUGHLIN and STALEY, *Circuit Judges.*

After due consideration the petition for rehearing in the above-entitled case is hereby denied.

By THE COURT

STALEY.

Dated:

January 28, 1960.

APPENDIX D.

Statutes Involved.

TITLE 18, U. S. C.

§ 4163. Discharge. A prisoner shall be released at the expiration of his term of sentence less the time deducted for good conduct. A certificate of such deduction shall be entered on the commitment by the warden or keeper (June 25, 1948, c. 645, 62 Stat. 853).

§ 4164. Released prisoner as parolee. A prisoner having served his term or terms less good-time deductions shall, upon release, be deemed as if released on parole until the expiration of the maximum term or terms for which he was sentenced less one hundred and eighty days. • • •

(Added June 29, 1951, c. 176, 65 Stat. 98).

§ 4203. Application and release; terms and conditions.

(a) • • • Such parolee shall be allowed in the discretion of the Board, to return to his home, or to go elsewhere, upon such terms and conditions, including personal reports from such paroled person, as the Board shall describe, and to remain, while on parole, in the legal custody and under the control of the Attorney General, until the expiration of the maximum term or terms for which he was sentenced. • • •

(June 25, 1948, c. 645, 62 Stat. 854).

FEDERAL RULES OF CIVIL PROCEDURE.

Rule 52. *Findings by the Court.*

(a) Effect. • • • Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of witnesses. • • •